KOID HONG KEAT

v.

RHINA BHAR

HIGH COURT MALAYA, PENANG
TUAN SELVENTHIRANATHAN J
[CIVIL SUIT 22(23)-97-1987]
10 MAY 1996

CIVIL PROCEDURE: *Action - Dismissal of action - Failure to serve notice of intention to proceed - Rules of the High Court 1980, O. 3 r. 6 - Failure to notify defendant of action being set down for trial - Rules of the High Court 1980, O. 34 r. 5(1) - Form 64.*

CIVIL PROCEDURE: *Action - Dismissal of action - Opportunity to show cause against dismissal - Whether Court should allow - Non-compliance with rules of Court - Intentional and contumelious default - Inordinate and inexcusable delay.*

CIVIL PROCEDURE: *Want of prosecution - Whether to dismiss action - Considerations - Limitation period not expired - Weight to be given - Discretion of Court - Contumelious default.*

CIVIL PROCEDURE: *Documents - Bundle of documents - Failure to deliver - Rules of the High Court 1980, O. 34 r. 3(1) - Form 63.*

CIVIL PROCEDURE: *Rules of the High Court 1980, O. 34 r. 7 - Failure to give notice of trial - Failure to apply for extension of time to give notice - Rules of the High Court 1980, O. 34 r. 8(1).*

CIVIL PROCEDURE: *Summons for directions - Failure to fix period within which to set down action for trial - Rules of the High Court 1980, O. 34 r. 2(1) & (2) - Failure to take out summons for directions within one month after pleadings closed - Rules of the High Court 1980, O. 25 r. 1(2).*

This was an action in which the plaintiff, a licensed commission agent, brought a claim against the defendant, an advocate and solicitor, on 30 March 1987, alleging that the defendant had reneged on an oral agreement entered into between them by which the defendant was to pay to him 10% of the fees collected in respect of some 543 road accident cases that he had referred to the defendant.

The defendant entered appearance on 9 July 1987 and filed her defence on 6 August 1987. On 30 November 1988 she applied to strike out the action for want of prosecution, or, alternatively, under O. 18 r. 19(1) of the Rules of the High Court 1980 ('the RHC') and/or the inherent jurisdiction of the

Court. Pending the defendant's application to strike out, the plaintiff filed his summons for directions on 15 December 1988. On 25 January 1989 the defendant withdrew that part of her application relating to want of prosecution, and, on 24 April 1989 the alternative prayer in her application was dismissed by the High Court, and subsequently, by the then Supreme Court on appeal thereto. On 12 September 1989 the plaintiff obtained the orders on his summons for directions.

Held:

[1] The plaintiff did not apply for and obtain any order in his summons for directions fixing a period within which to set down the action for trial. This failure clearly contravened O. 34 r. 2(1) of the RHC.

[2] The plaintiff made no application to extend the one-month period within which he had to take out a summons for directions. His summons for directions was filed almost one year and three months out of time. This was in breach of O. 25 r. 1(2) of the RHC which requires summons for directions to be taken out within one month after the pleadings are deemed to be closed. Thus, in so filing his summons for directions, the plaintiff had also breached O. 3 r. 6 of the RHC by not serving notice of his intention to proceed on all the parties concerned.

[3] Having breached O. 34 r. 2(1) & (2) of the RHC, the plaintiff proceeded to obtain a date for the trial of his action. In this connection, he had also contravened O. 34 r. 5(1) of the RHC in failing to notify the defendant in Form 64 of the RHC that he had set down the action for trial.

[4] The plaintiff had failed to comply with O. 34 r. 3(1) of the RHC by not delivering to the Registrar a request in Form 63 of the RHC that the action be set down for trial together with two bundles containing the writ, the pleadings, any notice or order for particulars and the particulars given, and all orders made on the summons for directions.

[5] The plaintiff had failed to comply with O. 34 r. 7 of the RHC in not giving notice of trial after the time for the delivery of the reply expired on 20 August 1987. He also did not apply under O. 34 r. 8(1) of the RHC for an extension of time to give notice of trial.

[6] There was no reason for the Court to accede to the plaintiff's request for an opportunity to show cause against the dismissal of his action. The plaintiff had not complied with the requirements of the RHC in the prosecution of the action. There was a blatant disregard for the RHC which was compounded by the plaintiff's failure to fulfil his undertaking to the Court to deliver the bundles of documents as required under O. 34 r. 3(1) of the RHC.

[7] The plaintiff's failure to deliver the said bundles amounted to an 'intentional and contumelious' default in complying with the peremptory order of the Court. The plaintiff was also guilty of an 'inordinate and inexcusable delay' in the prosecution of his action.

[8] The fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved. But even if the limitation period has not expired, the discretion to dismiss the action for want of prosecution is exercisable where there has been contumelious default on the part of the plaintiff.

[Application dismissed with costs.]

Cases referred to:

Ratnam v. Cumarasamy & Another [1965] 31 MLJ 228 ***(foll)***
Lee Guat Eng v. Tan Lian Kim [1985] 2 MLJ 196 ***(refd)***
Vasudevan v. T Damodaran & Another [1981] 2 MLJ 150 ***(foll)***
Toh Hock Thye & Others v. Toh Chwee Biow [1982] 1 MLJ 152 ***(foll)***
Birkett v. James [1978] AC 297 ***(refd)***
Greek City Co Ltd. & Another v. Demetriou (trading as Spectron Electronics) & Another ***(refd)***
Greek City Co. Ltd. v. Athanasiou (trading as Alpha Alpha Electrical Contractors) [1983] 2 All ER 921 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 18, r. 19(1), O. 25 r. 1(2), O. 33, O. 34 r. 2(1), (2), 3(1), 5(1),

For the plaintiff - Gan Teik Chee (subsequently Paul Chin); M/s. Gan Teik Chee & Ho
For the defendant - RJ Manecksha; M/s. Ong & Manecksha

JUDGMENT

T Seventhiranathan J:

The plaintiff, who describes himself as a licensed commission agent, filed these proceedings on 30 March 1987 against the defendant, who is an advocate and solicitor of the High Court in Malaya, alleging that the defendant had reneged on an oral agreement entered into between them sometime in 1980 whereby the plaintiff was to be paid ten percent of the fees collected by the defendant in respect of some five hundred and forty-three road-accident cases which had been referred to the defendant by the plaintiff for consultation and institution of legal proceedings. By his statement of claim the plaintiff alleged "that although a good number of cases had been resolved satisfactorily, the defendant had to date only paid the plaintiff the agreed rate of ten percent of the fees collected in respect of only sixty-three cases, particulars of which

would be furnished at the time of discovery". The plaintiff alleged further that his repeated requests for a statement of all cases settled to date and for his share of the fees collected had not been met. He therefore prayed for:

(a) an account of the progress of the cases referred to the defendant between 1980 and 1985 to be given;

(b) an account of the fees collected by the defendant and the plaintiff's share thereof in respect of the cases concluded between 1980 and 1985 to be given;

(c) an order for the payment by the defendant to the plaintiff of the plaintiff's share of the fees received to date and subsequently;

(d) interest on all fees due to the plaintiff at the rate of eight percent per annum from the date of receipt of the fees by the defendant to the date of realisation; and

(e) the costs of these proceedings.

The defendant entered appearance on the 9 July 1987 and filed and delivered her defence on the 6 August 1987.

On 30 November 1988, the defendant made an application for this action to be dismissed for want of prosecution or, alternatively, to be struck out pursuant to O. 18, r. 19(l) of the Rules of the High Court 1980 ["the Rules"] and/or under the inherent jurisdiction of the Court. (Any further reference to an Order and/or a rule by itself in this judgment shall mean that Order and/or rule of the Rules of the High Court 1980).

The defendant averred in her affidavit in support of the application to dismiss the action that the plaintiff had taken no further steps in the matter after she had delivered her defence on 6 August 1987, that he had not even taken out a summons for directions and that he was guilty of inordinate and inexcusable delay in the prosecution of the action. She further averred that the plaintiff's claim disclosed no reasonable cause of action and was frivolous and vexatious and an abuse of the process of the Court as the plaintiff's cause of action was founded on an alleged oral contract to share fees with an advocate and solicitor which oral contract, even if proved, was unenforceable as it was contrary to law and public policy.

While this application was pending hearing, the plaintiff on the 15 December 1988 filed his summons for directions.

On 25 January 1989, the defendant withdrew that part of her application which related to the dismissal of the action for want of prosecution. The prayer in the alternative in her application to strike out the action under O. 18, r. 19(l) was heard and dismissed with costs by a predecessor of mine on the 24 April

1989. The defendant's appeal against this decision was dismissed by the then Supreme Court on the 6 February 1990.

On 12 September 1989 the plaintiff obtained the following orders on his summons for directions:

(a) that the plaintiff and the defendant do within 14 days serve on each other a list of documents (and file an affidavit verifying such list);

(b) that there be inspection of documents within 7 days of the service of the lists (filing of the affidavits);

(c) that the be 21/2 days for the trial of the action and that there be 4 witnesses for the plaintiff; and

(d) that the costs of the application be costs in the cause.

It is to be noted that the plaintiff did not apply for and obtain any order in his summons for directions for the action to be set down for trial. The failure to do so clearly contravened O. 34, r. 2(l) which requires every order made on a summons for directions to fix a period within which the plaintiff is to set down the action for trial. Order 34, r. 2(2) provides that where the plaintiff does not set down the action for trial within the period so fixed, the defendant may set it down for trial or apply to the Court to dismiss it for want of prosecution.

It is also to be noted that O. 25, r. 1(2) requires the plaintiff to take out the summons for directions within one month after the pleadings in the action are deemed to be closed. The defence in this action was served on the 6 August 1987 and the pleadings were therefore deemed to be closed at the expiration of fourteen days after the service of the defence, ie on the 20 August 1987. Yet the plaintiff made no application to extend the time of one month within which to take out the summons for directions but instead filed the summons for directions on 15 December 1988, i.e. one year and almost three months from the expiry of the period of one month within which the summons for directions should have been applied for. In so filing the summons for directions the plaintiff was in further breach of yet another provision of the Rules, i.e. O. 3, r. 6 which provides that where a year or more has lapsed since the last proceeding in a cause or matter, the party who desires to proceed with the cause or matter must give to every other party not less than one month's notice of his intention to proceed. The record of the proceedings in the Court file discloses no such notice having been filed.

Subsequent to obtaining the specific orders adverted to above in his summons for directions, the plaintiff proceeded to obtain a date for the trial of the action despite not having obtained an order fixing the period within which to have the action set down for trial in accordance with O. 34, r. 2(l), not having set it down for trial in accordance with O. 34, r. 2 (2) and further not having

notified the defendant in Form 64 of the Rules that he had set the action down for trial as he is required to do by O. 34, r. 5(1).

The trial of the action was set down for 28 June 1993 before another predecessor of mine. The record of the proceedings in the Court file shows that the plaintiff's solicitors had written to the Court on 15 June 1993 seeking an adjournment of the trial on the 28th. On the latter date, the Court was also informed that the orders made on the summons for directions had not been complied with. The Court thereupon adjourned the action to the next fixing list and also made an order that no trial date was to be given until the plaintiff's solicitors informed the Court that the orders made on the summons for directions had been complied with.

Despite the orders made on the summons for directions not being complied with, on 8 November 1993 the plaintiff's solicitors wrote to the Court asking for a trial date and the action was fixed for hearing on 26 April 1994 before another Judge who had been transferred to this Court. It was, however, taken off the hearing list and subsequently fixed for hearing and adjourned on a number of occasions for various reasons. It was then put on the fixing list before me on 24 June 1995 when the trial was set down for 10 October 1995.

At the hearing on 10 October 1995, Encik Gan Teik Chee appeared for the plaintiff and the defendant was represented by Encik RJ Manecksha. At the outset, the Court pointed out to Encik Gan that the bundles of documents required to be delivered to the registrar under O. 34, r. 3(i) had not been so delivered. Encik Gan then informed the Court that this had not been done owing to an oversight and he undertook to produce the bundles subsequently and, subject to that undertaking, he proceeded to open the case for the plaintiff. He adverted to the disciplinary committee proceedings taken against the defendant under the Legal Profession Act 1976 and gave notice that he would be seeking to admit in evidence in the trial the findings of fact before the disciplinary committee. However, should the findings be ruled to be inadmissible, he would have the evidence repeated and adduced during the course of the trial. He concluded by stating that the Court would have to rule on the admissibility of the bundle pertaining to the proceedings of the disciplinary committee before he could call his first witness. However since he as well as Encik Manecksha were both not prepared to argue on the admissibility of the bundle that day, the hearing was adjourned to 19 January 1996.

On the latter date, the hearing was adjourned to 19 April 1996 owing to Encik Manecksha not being able to appear.

On 19 April 1996, the Court had the action stood down to the later part of the morning as the parties had yet to frame the preliminary issues upon which the ruling of the Court was to be sought.

During the adjournment the Court noticed that the bundles of documents required to be delivered to the Registrar pursuant to O. 34, r. 3(i) had still not been delivered despite the undertaking to do so given by Encik Gan on 10 October 1995. The Court also noted the other infractions of the Rules adverted to earlier in this judgment, i.e. the failure of the plaintiff:

(a) before filing his summons for directions on 15 December 1988, to give notice of intention to proceed in accordance with O. 3 r. 6 after a lapse of more than one year since the last proceeding in the action, which was the delivery of the defence on 6 August 1987;

(b) to obtain an order in his summons for directions fixing a period within which to set down the action for trial in accordance with O. 34, r. 2(l);

(c) to set the action down for trial in accordance with O. 34, r. 2(2) within the period which should have been fixed under O. 34, r. 2(1) for setting the action down for trial;

(d) to take the necessary steps to comply with O. 34, r. 3(1) by delivering to the Registrar a request in Form 63 of the Rules that the action be set down for trial together with two bundles containing the writ, the pleadings, any notice or order for particulars and the particulars given, and all orders made on the summons for directions;

(e) to comply with O. 34, r. 5(1) by notifying the defendant in Form 64 of the Rules that he had set the action down for trial; and

(f) to comply with O. 34, r. 7 by giving notice of trial after the time for the delivery of the reply expired on 20 August 1987, or to apply under O. 34, r. 8(1) for an extension of time to give notice of trial.

When the Court resumed sitting after the adjournment, the attention of Encik Paul Chin, who now appeared for the plaintiff, was drawn to Chief Justice's Circular No 2 of 1996. That circular requires the Court to ensure that all rules and procedures specified in relevant laws are adhered to strictly during the hearing of a case in order to prevent any allegation being made that the Courts are not following uniform practice and procedure in the hearing of cases. The cases of *Ratnam v. Cumarasamy & Another* [1965] 31 MLJ 228 and *Lee Guat Enq v. Tan Lian Kim* [1985] 2 MLJ 196 referred to in the circular on the exercise of the Court's discretion were also drawn to his attention in respect of the various infractions of the Rules by the plaintiff discussed in the preceding part of this judgment and he was thereupon given an opportunity to explain why the Rules had not been complied with.

Encik Paul Chin said he had no knowledge as to why the Rules had not been complied with and he applied for an adjournment to rectify the shortcomings in the plaintiff's prosecution of this action.

Encik Manecksha submitted that once the orders had been made on the summons for directions, the parties would have to take the necessary steps, including proceeding to the inspection of documents, to comply with the orders. Only after that could the parties proceed to the discovery of documents. In the present action the plaintiff had not taken any steps to allow for the inspection of documents before the parties could proceed to discovery.

In this context the Court noted that the plaintiff had in paragraphs 4 and 5 of his statement of claim averred that the particulars of the road-accident cases that he had referred to the defendant of which "a good number had been resolved satisfactorily, including sixty-three cases in respect of which he had been paid the agreed rate of ten percent of the fees collected, would be furnished at the time of discovery". It was, therefore, in the Court's view, crucial to the defendant to have the particulars of the said cases furnished in order to prepare her case for the trial.

Encik Manecksha submitted further that the preliminary issues which the plaintiff wanted determined under O. 33 must be raised through a proper application and should not be raised orally as was being done here. He also was in no position to agree to facts which were in dispute merely to accord with the plaintiff's oral application to have the preliminary issues, as intended to be framed by the plaintiff's Counsel, determined. The crux of the defence was that there was no such oral agreement between the plaintiff and the defendant which the plaintiff claimed existed. The defendant pleaded only in the alternative that the alleged agreement (the existence of which was not admitted) was void for illegality and that its enforcement would be contrary to public policy. The Court would therefore have to determine in a trial after hearing witness evidence whether there was such an oral agreement. If only the Court found that there was such an oral agreement could it then proceed to consider whether the agreement was void for illegality and whether ats enforceme nt would be contrary to public policy. In the circumstances the present action was very far from being ready for trial and should be dismissed for want of prosecution, the plaintiff also having taken no steps to comply with the orders made by the Senior Assistant Registrar on the summons for directions.

Encik Paul Chin then applied for an adjournment to rectify the shortcomings in the prosecution of this action and withdrew the plaintiff's application for the trial of preliminary issues under O. 33.

The Court did not grant the adjournment and proceeded to dismiss the action with costs for non-compliance with the Rules. The Court also found that no grounds had been shown for the Court to exercise its discretion to grant an adjournment to enable the plaintiff to rectify the shortcomings.

Encik Paul Chin then renewed his application for an adjournment. He asked the Court to set aside its order dismissing the action and give the plaintiff an opportunity to show cause why the action should not be dismissed.

Encik Manecksha, on the other hand, opposed the move to set aside the Court's order dismissing the action. He submitted that the Court had made an order and although the order had not been perfected, there had to be grounds for the Court to set it aside, which grounds were not present here.

Encik Paul Chin thereupon again renewed his plea for the plaintiff to be given an opportunity to show cause against the dismissal of the action.

However, the Court found no good reasons to accede to this request and it therefore confirmed the order it had made dismissing the action. The reasons for doing so are discussed earlier in this judgment and need not be repeated here except to reiterate that the plaintiff had not complied with the requirements of the Rules in the prosecution of this action. In fact there had been blatant disregard for the Rules which was compounded by a failure to fulfil the undertaking given to the Court on 10 October 1995 by the then Counsel for the plaintiff to deliver the bundles, as required and referred to in O. 34, r. 3(1). Unfortunately Encik Paul Chin who appeared for the plaintiff on the 19 April 1996 was totally in the dark as to this undertaking given by his predecessor.

In the view of the Court, the failure to deliver the bundles even after more than six months after the undertaking had been given amounted to intentional and contumelious default on the part of the plaintiff in complying with the peremptory order of the Court to so deliver the bundles, thereby warranting the dismissal of the action.

In addition, the plaintiff was also guilty of an inordinate and inexcusable delay in the prosecution of the action as he had failed to take the necessary steps that he was required to take after the close of pleadings in order to proceed to trial. These steps which he had to take have already been dealt with. The factual situation in this action therefore was not unlike that in the case of *Vasudevan v. T. Damodaran and Another* [1981] 2 MLJ 150 in material respects where Abdoolcader J [as he then was] described the situation thus:

> No notice of trial has been given, no summons for directions issued, no discovery made and no steps whatsoever taken to set the action down for trial and proceed to a conclusive determination of the proceedings - all this coming on to seven years after the institution of the suit which itself was some ten years after the initia1 accrual of the cause of action on which the appellant's writ was founded, an aggregate of well-nigh seventeen years.

In the present action, no notice of trial was given. The summons for directions, although issued, did not fix the period within which the plaintiff was to set the action down for trial. The action was not properly set down for trial.

There was no inspection of documents in compliance with the summons for directions or discovery made consequent to the inspection of documents, although an undertaking was given in the statement of claim to allow discovery. This was the state of affairs nine years after the commencement of the action and seventeen years after the first road-accident case was purportedly referred to the defendant and upon which the cause of action was founded.

In the circumstances, the Court was of the view that the test laid down by one panel of the then Federal Court in *Vasudevan v. T. Damodaran and & Another* and approved by another of its panels in *Toh Hock Thye and Others v. Toh Chwee Biow* [1982] 1 MLJ 152 in the following terms:

(1) whether the Court is satisfied that the plaintiff's default has been intentional and contumelious; or

(2) whether the Court is satisfied that the plaintiff or his lawyer is guilty of such an inordinate and inexcusable delay that the defendant has been prejudiced by it, in order to justify dismissing an action for want of prosecution was satisfied in the present action.

The Federal Court in *Vasudevan v. T. Damodaran & Another* and *Toh Hock Thye and others v. Toh Chwee Biow* relied upon the decision of the House of Lords in *Birkett v. James* [1978] AC 297 in arriving at the test to be applied in deciding whether an action should be dismissed for want of prosecution. That test was elaborated further by Goulding J in the Chancery Division of the High Court in England in the cases of *Greek City Co. Ltd. and Another v. Demetriou (trading as Spectron Electronics) and Another* and *Greek City Co. Ltd. v. Athanasiou (trading as Alpha Alpha Electrical Contractors)* [1983] 2 All ER 921 at 925 as follows:

> A question that arose in *Birkett v. James* was whether the Court ought in general, and particularly in that case, to exercise its jurisdiction to dismiss an action for want of prosecution where it was open to the plaintiff to issue a fresh writ withouto being met by a defence of a statute of limitation, and the conclusion of the House of Lords on that point was quite clear. Lord Diplock gave his own view in these words ([1977] 2 All ER 801 at 808, [1978] AC 297 at 322):
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> > For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution **where no question of contumelious default on the part of the plaintiff is involved**; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending.

Later Lord Diplock repeated the conclusion (see [1977] 2 All ER 801 at 810, [1978] AC 297 at 325). He stated what he there called the general principle:

> that where the limitation period has not expired and the plaintiff is likely to, issue a fresh writ if his pending action is dismissed for want of prosecution, this is a conclusive reason against dismissal.

That decision in the House of Lords was followed by a case in the Court of Appeal, *Hytrac Conveyors v. Conveyors International Ltd.* [1982] 3 All ER 415, [1983] 1 WLR 44 [the emphasis in Lord Diplock's speech is mine].

It is therefore clear from *Birkett v. James* and *Greek City Co. Ltd.* that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution **where no question of contumelious default on the part of the plaintiff is involved.** However, it cannot be ascertained from the statement of claim in the present action whether the limitation period applicable in respect of each road-accident case purportedly referred to the defendant would have expired unless it is also known as to when that case was resolved. But even if the limitation period had not expired, the discretion to dismiss the action for want of prosecution is exercisable where there has been contumelious default on the part of the plaintiff. There was such contumelious default in the present action, in particular in respect of the breach of the undertaking given by the plaintiff's Counsel to furnish the bundles specified in O. 34, r. 3(1), which breach was also tantamount to the breach of a peremptory order of the Court.

In these circumstances, there was no material before the Court upon which the Court could consider whether to exercise its discretion in favour of the plaintiff by allowing him time to rectify the shortcomings in the prosecution of the action. He had even had an extended period of more than six months, from 10 October 1995 to 19 April 1996, in which to furnish the bundles referred to in O. 34, r. 3(1) but he failed to do so and gave no explanation for his failure. Lord Guest expressed his view thus in *Ratnam v. Cumarasamy and Another* at page 229 of the report in respect of the non-observance of the rules of Court:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a Court in extending the time during which some step in procedure requires to be taken there must be some material upon which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a timetable for the conduct of litigation. The only material before the Court of Appeal was the affidavit of the appellant. The grounds there stated were that he did not instruct his solicitor until a day before the record of appeal was due to be lodged and that his reason for this delay was that he hoped for a compromise. Their Lordships are satisfied that the Court of Appeal were entitled to take the view that this did not constitute material upon which they could

exercise their discretion in favour of the appellant. In these circumstances their Lordships find it impossible to say that the discretion of the Court of Appeal was exercised upon any wrong principle.

Having regard, therefore, to the facts in respect of the chronology of the proceedings in this action and the total failure of the plaintiff to comply with, or explain the failure to comply with, a peremptory order of the Court based on an undertaking given to the Court by the plaintiff's Counsel and the non-compliance with different provisions of the Rules discussed earlier, the Court was constrained to dismiss the action with costs.

Reported by Gan Peng Chiang